Supreme Court of the United States

OCTOBER TERM, 1942.

No. 613

LOUISVILLE GAS AND ELECTRIC COMPANY, - Petitioner,

versus

FEDERAL POWER COMMISSION, - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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LOUISVILLE GAS AND ELECTRIC COMPANY, - *Petitioner,*

v.

FEDERAL POWER COMMISSION, - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Louisville Gas and Electric Company, hereby petitions this Honorable Court for a writ of certiorari to be issued to review the judgment entered in the United States Circuit Court of Appeals for the Sixth Circuit on June 29, 1942 (petition for rehearing denied October 6, 1942), in the above-entitled cause and respectfully shows:

SUMMARY STATEMENT OF FACTS.

Petitioner, Louisville Gas and Electric Company (hereinafter called the Company) is a Kentucky corporation owning and operating an electric and gas business in the city of Louisville, Kentucky, and environs in Kentucky. The Company is being regulated by the Public Service Commission of Kentucky as to the rates it may charge, the service it must render, the securities it may issue, its accounts and accounting system and everything else connected with the Company. (Ky. Stats. 3952-1 to 3952-61, K. R. S. 278.010 to 278.990.) It will not be claimed by the respondent, Federal Power Commission (hereinafter called the Commission) that it has jurisdiction over the Company's rates, service or securities. The 1935 Federal Power Act, in giving the Commission jurisdiction over certain matters of certain electric companies, whether they owned licenses or not, provides that "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States" (16 U. S. C. A. 824). The Court below held (erroneously as the Company contends) that the Commission had jurisdiction over the Company's accounts and accounting system, notwithstanding the fact that such accounts and accounting system were being regulated by the State of Kentucky.

The Company is the owner of a 50-year license granted in 1925 by the Commission for the construction and operation of a hydro-electric development at the falls of the Ohio River near Louisville, Kentucky, known as Project 289. The license was issued to Louis-

ville Hydro-Electric Company, an affiliate, and, with the Commission's consent, was transferred to the Company. The license was issued pursuant to the Federal Water Power Act of 1920 (41 Stat. 1077, 16 U. S. C. A. 791-823).

This 1920 Act gave the Commission jurisdiction over the rates, service, securities, etc., of all licensees. However, to preserve State regulation of local or intrastate matters, and to avoid the unthinkable effects of dual control the 1920 Act provided that "the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter" (16 U. S. C. A. 812).

The 1920 Act also gave the Commission jurisdiction to prescribe a system of accounts for licensees (16 U. S. C. A. 797f). However, the Commission to preserve State regulation of local matters and to avoid unworkable dual control provided in its first System of Accounts dated November 20, 1922, that where "the records and accounts of such licensee are kept and maintained under and in conformity with the accounting rules and regulations prescribed by the public utility commission or other commission or regulatory body of the State or States in which the project is located, the licensee will not be required to maintain also the system of accounts provided by Section 1 hereof, but the system of accounts prescribed by the State regulatory body may be substituted therefor if desired." Thus, under

the 1920 Act, both Congress and the Commission expressly refrained from Federal regulation of matters that were being regulated by the States. This policy of non-interference with matters that were being regulated by the States was sealed into the law in the Federal Power Act of 1935, as a limitation on the Commission's powers of regulation as follows: "* * * such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States" (59 Stat. 847, 16 U. S. C. A., Sec. 791).

That part of the 1920 Act (16 U. S. C. A. 797 (f)) which gave the Commission jurisdiction over the accounts and accounting system of licensees was repealed by the 1935 Federal Power Act, so that the Commission since 1935 has no more jurisdiction over the accounts and accounting system of a licensee than of other electric utility companies.

Under the 1920 Act, the Commission was directed to make a "determination" of the "net investment" of every licensed project on completion of the project (16 U. S. C. A. 797). "Net investment" is defined in the 1920 Act to mean the "actual legitimate original cost" as defined and interpreted in the Classification of Investment in Road and Equipment of Steam Roads, issue of 1914, Interstate Commerce Commission plus similar costs of additions thereto minus the sum of several items. Thus, "actual legitimate original cost" is one of the factors to be determined in arriving at the "net investment" of a licensed project. There is nothing occult or mysterious about the words "actual legitimate original cost." They are not contained

in the I. C. C. 1914 classification, nor are they contained in any other classification or system of accounts. An examination of the 1914 I. C. C. classification shows that the words mean nothing more or less than original cost.

Jurisdiction to determine the "net investment" or "actual legitimate original cost" of a licensed project was not for the purpose of regulating rates, services or securities because the 1920 Act gave the Commission jurisdiction over these matters only in those cases where there was no State regulatory body with jurisdiction. Nor was it for the purpose of regulating the licensees' system of accounts because the Commission disclaimed jurisdiction over a licensees' system of accounts where the licensee was following a State Commission's system of accounts. Jurisdiction to determine "net investment" or "actual legitimate original cost" of a licensed project was for three purposes only:

(a) Amortization reserves after the first 20 years of operation (16 U. S. C. A. 803-d). Project 289 was put into operation in 1928 so the Commission's "finding" of "net investment" could not be used for this purpose until 1948.

(b) Recapture or purchase by the Government. The 1920 Act provided (16 U. S. C. A., Sec. 807) that the United States has the right to recapture or purchase a licensed project at the expiration of the license, and that the Government should pay the "net investment" to be "determined by agreement between the Commission and the licensee, and in case they cannot agree by proceedings in equity instituted by the United

States." This section was amended by the Federal Power Act of 1935 to provide that if the parties could not agree on the "net investment," then it should be "determined by the Commission after notice and opportunity for hearing." So that in no instance was the Commission's "determination" of the "net investment" or "actual legitimate original cost," made on completion of a project, final and binding. Under the 1920 Act, if the Government decided to purchase, the "net investment" was to be fixed by agreement or by the Court at the time of the purchase. Under the 1935 Act, it is to be fixed by agreement at the time of the purchase or determined by the Commission at that time "after notice and opportunity for hearing" from which there could be an appeal to the Courts. The license for Project 289 was issued in 1925, and was for 50 years so that the time for using "net investment" for a recapture or purchase by the Government will not arise until 1975.

(c) The other provision of the 1920 Act where the finding of "net investment" by the Commission might be pertinent would be in the event of an emergency taking over of the project by the Government, in which event the Government is required to pay "just and fair compensation for the property" (16 U. S. C. A., Sec. 809). "Net investment" might be evidence on the question of compensation.

The 1920 Act provided (16 U. S. C. A. 797 (a)) that in order to aid the Commission in determining the "net investment" the licensee after the construction of the original project or any addition thereto shall

file a verified statement showing the "actual legitimate original cost" of construction of the project. Such a statement was filed for Project 289. The Commission's Staff made an investigation and filed a Preliminary Accounting Report, taking exception to certain items. After a hearing the Commission rendered Opinion No. 11 on October 31, 1933 (R., Vol. II, p. 963). On that same date it entered an order styled "Order Determining Cost of Project 289, Ky. (Ohio Falls)" (R., Vol. II, p. 1000). By this order the Commission determined that the "actual legitimate original cost" of Project 289 was some $800,000 less than had been claimed in the statement and expended on the project. In response to a petition for rehearing there was an additional hearing, and on September 30, 1937, the Commission entered another order styled "Determination of Actual Legitimate Cost" (R., Vol. II, p. 1256). This order allowed approximately $200,000 that had been disallowed in the 1933 order. The net result of the two orders was a disallowance of $601,-973.57 that had actually been spent in the construction of the project.

There is nothing in the 1933 or 1937 orders, which were mere "determinations" or "findings" of cost, remotely suggesting that the Commission had in mind any idea that the disallowed amount should be charged to surplus. The orders did not direct the Company to do anything except make a mere bookkeeping entry showing the Commission's "determination" of the "actual legitimate original cost" of Project 289. The Company believed that the orders were erroneous in making the

disallowances, but was willing to and did make the bookkeeping entries. In fact, it was necessary under the law for the Commission to make a "determination" of "net investment" or "actual legitimate original cost," and it was proper for such "determination" to be recorded in the Company's books as a memorial of the Commission's finding, such determination to be used subsequently as to amortization reserves, recapture, emergency taking over or any other matter as to which the Commission might have jurisdiction over the Company and if so subsequently used to the detriment of the Company there would be the right of appeal to the Court.

Although the Commission had made numerous "determinations" of the "actual legitimate original cost" of licensed projects, the Commission never in any instance, prior to 1939, intimated that the disallowed amount should be charged to surplus. It was shown in the Company's petition for rehearing in the Court below (R., Vol. III, p. 1489) that from at least 1920 to the present, the Company's books, records and accounts are annually audited by a national firm of certified public accountants. This firm was furnished a copy of the 1933 Order and a copy of the 1937 Order when the audits were made for those years. These independent accountants did not think that either of the Orders required or even intimated that the disallowed amount should be charged to surplus. If they had thought anything of the kind, they would obviously have so stated in their annual audit and report for these and subsequent years until the matter was settled.

Clearly they would not have failed to note the possibility of the Company losing such a large amount of its surplus, and yet the independent auditors never made any mention of either the 1933 or 1937 orders. The 1939 and subsequent audits have referred to a 1939 Order of the Commission referred to hereafter.

The Company is required to register new or refunding securities with the Securities and Exchange Commission. It was shown to the Court below (R., Vol. III, p. 1494) that in 1936 the Company issued and sold $28,000,000 "First and Refunding Mortgage Bonds 3½% Series due 1966." The Securities and Exchange Commission has a form for the registration of securities which requires a full disclosure of everything concerning the applicant company. The law provides heavy penalties against the applicant company, its officers and directors for the misstatement of a material fact or for the omission to state a material fact. As a part of such registration statement, applicants are required to file audits and statements by independent certified public accountants. It stands to reason that if the Company its officers and directors or if the underwriters or the independent accountants or any of the above had had even a mere suspicion that the 1933 Order involved the possibility, however remote, of so large a charge to surplus they would not have dared to omit to state such a material fact. The fact that the 1936 Registration Statement of this Company contained no hint that the Commission's Order of 1933 involved the possibility of a charge to surplus is a demonstration that each and all of the parties to that regis-

tration statement thought that the Order involved a mere bookkeeping entry only.

The then Commission and its then staff were likewise of this opinion. The Commission's brief, involving an order identical with our 1933 and 1937 orders, filed November 3, 1933,[1] contained formal, full agreement by the Commission with our contention that the 1933 and 1937 Orders were not appealable until subsequently used to the Company's detriment as follows:

> p. 12. "The concurring opinion of Commissioner McNinch (12th Annual Report, Federal Power Commission, page 217) refers to the argument presented by the plaintiff before the Commission in which plaintiff contended that if the Commission possesses the power to determine currently the cost of licensee's project such determination 'could not be reviewed earlier than 20 years and perhaps not until the expiration of the license period, 50 years, * * *' The defendants are in full agreement with the position thus taken by plaintiff's counsel at that time that there can be no judicial review of the Commission's cost determination order until occasion arises when the Commission shall undertake to use such determination, in an amortization, or recapture, or similar proceeding."

More than a year and a half after the Order of September, 1937, like a "bolt out of the clear," the Commission on April 4, 1939, issued an order styled, "Order to Show Cause" (R., Vol. II, p. 1270), in which

[1]In the case of Alabama Power Company v. Smith and others as members of the Federal Power Commission in the Court of Appeals for the District of Columbia on the Commission's motion to dismiss.

it directed the Company to show cause under oath why the disallowed amount of $601,973.57 should not be charged to the Company's surplus account. Under Kentucky law, a corporation's surplus is property which may be used for any legitimate corporation purpose (*Smith* v. *Southern Foundry Company,* 166 Ky. 208, 179 S. W. 205). This is also general law. The consent of the Securities and Exchange Commission is not necessary for the payment of dividends out of earned surplus. That Commission has frequently authorized the payment of dividends out of unearned surplus. All of the Company's surplus has been earned in the hard way and set aside for future emergencies. It is not known what would have happened to the Company after the 1937 disastrous Ohio River flood, except for the surplus that it had accumulated. A charge of $601,973.57 to surplus is no mere bookkeeping entry. It would wipe out more than half of the Company's surplus. It would take the Company's property just as effectively as if the Company were required to pay $601,973.57 to some third party. During all of the 19 years that the 1920 Act had been in effect, the Commission had never until that time attempted to direct that the disallowed amount in a "determination" of "actual legitimate original cost" of a licensed project should be charged to surplus.

The Company filed a response to the Show Cause Order (R., Vol. II, p. 1279). Without any hearing or opportunity to be heard, the Commission on October 31, 1939, entered an order directing the Company to charge the disallowed amount of $601,973.57 to sur-

plus. The Company filed a petition for rehearing (R., Vol. 2, p. 1275). The response and the petition for rehearing contended among other things, (a) that the Commission had no jurisdiction over the Company's accounts and accounting system; (b) that the 1933 and the 1937 Orders did not contain any notice of a proposed charge to surplus; (c) that the orders, rules, regulations and system of accounts of the Public Service Commission of Kentucky required that the $601,973.57 should be kept in the Company's Electric Plant account, and not charged to surplus. The petition for rehearing also contended that the 1939 Order was entered without notice or hearing. When the petition for rehearing was not acted upon within 30 days the Company was required to take it as having been denied (16 U. S. C. A. 825 (l)), and filed its petition in the Sixth Circuit Court of Appeals for a review and the setting aside of the 1933, 1937 and 1939 Orders. The petition for review is printed in Vol. 3 of the Record beginning at p. 1337. The petition for review made the same contentions that were made before the Commission.

The Sixth Circuit Court of Appeals (a) held that the Commission had jurisdiction over the Company's accounts and accounting system, (b) sustained the Commission's motion to dismiss the petition for review insofar as it applied to the 1933 and 1937 orders and (c) affirmed the Commission's 1939 order. The reason for dismissing the appeal as to the 1933 and 1937 orders was stated by the Court below to be because in the Court's opinion the 1933 and 1937 orders

required that the disallowed amount be charged to surplus, that the Company should have known this, and that therefore appeals should have been, but were not taken within the time provided by Section 313 (a) and (b) of the Federal Power Act of 1935. Of course, when the 1933 order was entered the 1935 Federal Power Act had not been passed and under the 1920 Act there was no limit as to when appeals could be taken. The petition for rehearing showed to the Court below that the then Commission and its then Staff were contending in other cases as we are contending, *i. e.,* that orders similar to our 1933 and 1937 orders would not harm or hurt the licensee and were therefore not appealable unless and until they were subsequently used to the detriment of the licensee. Due to a change in personnel and a resultant change in policy of the Commission, this Company has been caught in what this Court through Mr. Justice Holmes has politely called, "between Scylla and Charybdis" (*Cedar Rapids Gas Company* v. *Cedar Rapids,* 223 U. S. 655.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. A., Sec. 825 l) and Section 240 of the judicial code as amended (43 Stat. 938, Sec. I, 28 U. S. C. A., Sec. 347). The Statutes, the validity of which are involved is the the 1935 Federal Power Act (49 Stat. 847, 16 U. S. C. A., Sec. 791 (a)) and the Federal Water Power Act of 1920 (41 Stat. 1077, 16 U. S. C. A. 791-823). The judgment of the Circuit Court of Ap-

peals was entered June 29, 1942, and petition for rehearing was denied October 6, 1942, and this petition is filed within three months thereafter.

QUESTIONS PRESENTED.

(1) Whether the Commission has jurisdiction over the Company's accounts and accounting system.

The Public Service Commission of Kentucky has and is exercising complete jurisdiction over the accounts and accounting system not only but also over the rates service, securities, etc., of the Company. The jurisdiction of the Federal Commission is thus limited by the 1935 Federal Power Act: "* * * such Federal regulation however to extend only to those matters which are not subject to regulation by the States." If this Court agrees with us on this question it would be an end of the case.

(2) Whether the Company is to be denied a judicial review of the Commission's 1933 and 1937 "determinations" of "actual legitimate original cost" because the Company thought as the then Commission and its then staff thought, *i. e.*, that such orders did not adversely affect it, and that no appeal could be taken unless and until such orders were subsequently used to the Company's detriment on the question of amortization, repurchase or other matters as to which the Commission had jurisdiction.

(3) Whether the Commission could make the 1939 order directing a charge of $601,973.57 to surplus without giving the Company any hearing thereon.

REASONS FOR GRANTING THE WRIT.

(1) The decision of the Circuit Court of Appeals involves a question of Federal law which has not been, but should be settled by this Court.

Does the Commission have jurisdiction over the Company's accounts and accounting system when the 1935 Federal Power Act limits the jurisdiction of the Commission to "those matters which are not subject to regulation by the States," and when the Company's accounts and accounting system rates, service, securities, etc., are being regulated by the Public Service Commission of Kentucky.

This question of Federal Law is important not only to the Company, but to a very large number of other electric companies. It should be decided by this Court.

(2) The decision of the Circuit Court of Appeals dismissing the appeal as to the 1933 and 1937 orders is in conflict with the decision of this Court that an order of a regulatory body making a "finding" of value or cost is not appealable unless and until it is used subsequently to the Company's disadvantage *United States* v. *Los Angeles R. R. Co.*, 273 U. S. 299. Since this was also the opinion of the then Commission, a change of personnel and of policy should not be used to squeeze the Company "between Scylla and Charybdis."

The decision is also in conflict with decisions of this Court that orders of a regulatory body which do not harm or adversely effect a party can not be appealed to the Courts *Rochester Telephone Corpora-*

tion v. *United States, et al.*, 307 U. S. 125; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 159.

CONCLUSION.

For the reason herein set forth, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The "determinations" by the Commission of the "actual legitimate original cost" of Project 289 were dated October 31, 1933 and September 30, 1937, and the Order of the Commission directing that the disallowed amount of $601,973.57 be charged to surplus was dated October 31, 1939. They are printed in Vol. II of the record at pages 1000, 1256 and 1293 respectively. The opinion of the Circuit Court of Appeals for the Sixth Circuit (Circuit Judges Hicks, Simons and McAllister) dated June 29, 1942 was written by Judge Simons, and is printed in the record in Vol. III, page 1473, and is reported in 129 Fed. (2d) 126. A petition for rehearing (R., Vol. III, p. 1473) was overruled October 6, 1942 (R., Vol. III, p. 1499).

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. A., Sec. 825 l) and Sec. 240 of the judicial code as amended (43 Stat. 938, Sec. I, 28 U. S. C. A., Sec. 347). The Statutes, the validity of which is involved, are the Federal Power Act of 1935 (49 Stat. 847, 16 U. S. C. A., Sec. 791 (a)), and the Federal Water Power Act of 1920 (41 Stat. 1077, 16 U. S. C. A. 791-823). The judgment of the Circuit Court of Ap-

peals was entered June 29, 1942 (R., Vol. III, p. 1459) and petition for rehearing was denied October 6, 1942 (R., Vol. III, p. 1499), and this petition is filed within 3 months thereafter.

FACTS.

The facts are as stated in the petition herein *ante* pp. 2-13.

SPECIFICATION OF ERRORS.

The Court below erred:

1. In holding that the Commission had jurisdiction over the Company's accounts and accounting system and also jurisdiction to require the charge to surplus of $601,973.57.

2. In holding that the 1933 and 1937 Orders could not be reviewed by the Court because appeals therefrom were not taken within the time prescribed by the 1935 Act.

3. In holding that the Company should have known from the 1933 and 1937 Orders that they directed a charge to surplus of the amount disallowed.

4. In holding that the 1939 Order requiring the charge to surplus and which was made without notice or hearing was not violative of the Fifth Amendment.

SUMMARY OF ARGUMENT.

(1) The Commission has no jurisdiction over the Company's accounts and accounting system because Congress limited the Commission's jurisdiction "to those matters which are not subject to regulation by the States," and the Company's accounts and accounting system not only, but its rates, services, securities etc. are being regulated by the Public Service Commission of Kentucky.

(2) The 1933 and 1937 Orders of the Commission were mere "determinations" or "findings" of cost or value and were not appealable until used in the 1939 Order to require a charge to surplus.

(3) The 1939 Order attempting to require that the disallowed amount of $601,973.57 be charged to surplus was entered without a hearing of any kind on the legality or propriety of the order. It is therefore void because of a denial of due process.

ARGUMENT.

POINT I.

The Commission Has No Jurisdiction Over the Company's Accounts and Accounting System Because Congress Limited the Commission's Jurisdiction "to Those Matters Which Are Not Subject to Regulation by the States," and the Company's Accounts and Accounting System Not Only, but Its Rates, Services, Securities etc. Are Being Regulated by the Public Service Commission of Kentucky.

In *Kirchbaum* v. *Walling,* 316 U. S. 517, this Court stated the difficulty that sometimes arises in deciding limits to which Federal legislation vests jurisdiction in the Federal Government and what Congress has left to the States:

> (520) "* * * The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States."
>
> (521) "* * * We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. * * * Congress may choose, as it has chosen fre-

quently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local."

(522) "* * * The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied."

In the instant case, Congress has stated emphatically the new federal jurisdiction over electric utilities—"such federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

In 1935 Congress passed comprehensive electric utility legislation. It enacted the Public Utility Holding Company Act of 1935 (49 Stat. 803, 16 U. S. C. A., Sec. 79 (a)-79 (r)) which provided strict regulation and the ultimate elimination of holding companies. Jurisdiction to administer this Act was given to the Securities and Exchange Commission. It also enacted the Federal Power Act. Part I of this Act consisted of Amendments to the 1920 Federal Water Power Act. Among other amendments was the repeal of the section (16 U. S. C. A. 797 (f)) which had given the Commission jurisdiction to establish a system of accounts for licensees. So that from 1935 to date the Commission has no more jurisdiction over the accounts and accounting system of a licensee than over the accounts and accounting system of an electric utility that does not own a license. As Part II of this 1935 Act Congress gave the Commission certain jurisdiction over electric utility companies regardless of whether they were the owner of a license or not, such jurisdiction however

was limited so as "to extend only to those matters which are not subject to regulation by the States."

The first section of Part II of the 1935 Federal Power Act specifically limiting Federal regulation and consequently the Commission's jurisdiction is as follows:

> "Declaration of policy; application of subchapter; definitions. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and the Federal regulation of matters relating to generation to the extent provided in this Part and the Part III next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States*" (16 U. S. C. A. 824).[2]

The italicized part above is clear and unambiguous. It is not loose language. It was not in the Bill as originally introduced. It will be recalled that there was much publicity regarding the 1935 utility legislation. There were numerous hearings before Congressional Committees. Such hearings are in three volumes comprising more than 2,300 pages.[3]

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[2]Italics supplied throughout.

[3]"Hearings before the Committee on Interstate and Foreign Commerce House of Representatives, Seventy-fourth Congress, First Session on H. R. 5423 to provide for control in the public interest of public utility holding companies using the mails and the facilities of interstate commerce, to regulate the transmission and sale of electric energy and natural gas in interstate and foreign commerce, and for other purposes."

The limitation on the Commission's jurisdiction was inserted by Congress after these hearings at which the proponents of the Bill, including a member of the Commission, the Solicitor of the Commission, a former member of the Commission, the General Counsel of the Committee of the House to investigate Holding Companies and numerous others were unanimous in saying that the purpose of the Bill was (a) to have Federal regulation in the no man's land which the States were unable to regulate, (b) to not interfere with State regulation. The proponents of the Bill said that it was to complement and not supersede State regulation.

Chairman Rayburn, of the House Committee, made this explicit statement in reporting on the Bill (H. R. Rep. No. 1318, 74th Cong., 1st Sess.):

> "Under the decision of the Supreme Court of the United States in *Public Utilities Commission* v. *Attleboro Steam & E. Co.* (273 U. S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. *Part II gives the Federal Power Commission jurisdiction to regulate these rates* * * * (p. 7).
>
> "The bill takes no authority from State Commissions * * * The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority * * * *Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill*" (p. 8).

Senator Wheeler, who was in charge of the Bill in the Senate, said:

"This bill, unlike many bills which have been proposed in these legislative halls, seeks not for further concentration of power in the hands of the government of the United States; on the contrary, the tendency of the bill is to make these power-holding companies decentralize, so that they can be controlled by local communities, or can be controlled in a small number of states where they carry on their operating facilities" (Vol. 79 of the Congressional Record, 74th Congress, First Session, p. 8384).

"* * * This, as the Senator would know if he had been there, is the statement made by the public utility people. They say: 'The public utility business is a local industry. It ought to be regulated locally;' and I agree with them. It ought to be owned locally, and it ought to be controlled locally, and that is what this bill seeks to have done" (Part 8, Vol. 79, p. 8388).

"* * * We preserve the state regulation completely in the bill, but in title II we made the positive statement that the policy should not be to interfere with state regulation, but to assist and help state regulation" (Part 8, Vol. 79, p. 8775).

Other proponents of the Bill testified before the Committee of the House as follows:

1. Dr. Walter M. W. Splawn, a member of the Interstate Commerce Commission and General Counsel of the Committee of the House of Representatives to investigate holding companies:

"These interregional holding companies have undertaken to tie a number of local or regional activities and operations into one top control. That

is to say, this is an industry which is essentially local and which should be regulated, should be managed, locally, and therefore regulated locally. That is, by the municipalities and by the States" (Hearings, p. 180).

"You understand, as the Federal Trade Commission pointed out to try to reach all of those abuses, you will have about 32 different bills or different sorts of approach and your constituents will be asking you to go into the regulation of the abuses, whereas with local regulation of operations and the elimination of holding companies the abuses would disappear. I believe that the regulation of the rates and the issuance of securities and *policing of the accounts* and fixing of valuations of these properties should be by the States and by the municipalities, because their activities are local" (Hearings, p. 180).

"Mr. Cooper: Doctor, you are satisfied that about 90 per cent of this field of public utilities is intrastate?

"Commissioner Splawn: To be more accurate, about 83 per cent.

"Mr. Cooper: Well, why can't they be regulated by State commissions?

"Commissioner Splawn: I think that is where it should be regulated, Mr. Cooper.

"Mr. Cooper: I agree with you on that. Does this bill provide for State regulation—I must confess that I have not gone over it very carefully.

"Commissioner Splawn: This bill, if you pass it, will turn these regulations right back to the States. * * *" (Hearings, pp. 184, 185).

"Mr. Cooper: Doctor, you believe then that the States should regulate this industry?

"Commissioner Splawn: I believe they should. * * *" (Hearings, p. 186).

2. Hon. Robert E. Healy, a member of the Securities and Exchange Commission and a former member of the Federal Power Commission (Hearings, p. 121):

> "Mr. Merritt: Dr. Splawn said a number of times that he favored companies which were locally directed, by local public authorities, and not from a central body.
>
> "Now, these integrated companies you have been speaking of, I take it, would be operated under the authority of the States in which they operate and not from Washington.
>
> "Commissioner Healy: I take it so.
>
> "Mr. Merritt: Or supervised rather.
>
> "Commissioner Healy: Yes." (Hearings, p. 371.)

3. Hon. Clyde L. Seavey, then and now a member of the Federal Power Commission (Hearings, p. 384):

> "Those are the two primary immediate objectives of the act.
>
> "These purposes and objectives are to be accomplished in the following way: First, by putting into action the authority of the Federal Government in a regulation which is not now carried out by the Federal Government; secondly, by supplementing of the State authorities, with the Federal authority without impinging upon the proper functions of the State authorities, and, thirdly, the coordination of the Federal and State authorities so that the full force of a complete regulation may be exerted" (Hearings, p. 391).

"As I have indicated, it is the purpose of this bill that the Federal Power Commission will assume only jurisdiction over the interstate wholesale business of these companies. I think I have already made that plain" (Hearings, p. 402).

4. Hon. Dozier DeVane, at that time Solicitor, Federal Power Commission (Hearings, p. 449):

"Mr. DeVane: There has been considerable discussion here as to what is the purpose of this legislation and the effect it will have upon States and upon State regulation, and in that connection, I wish to say that in the instruction to its representatives that participated in the preparation of this legislation, the Federal Power Commission directed that what it desired to recommend to Congress was legislation that would complement and not supersede State regulation.

"Our specific instructions, from our Commission, was to preserve to the fullest extent State regulation and to draw a law that would complement that regulation as far as Congress could go (Hearings, p. 495).

"I next wish to call your attention to Section 217, page 122. Notwithstanding the attempt so far as possible to make it clear that the bill does not usurp State authority, we added Section 217, which specifically declares that nothing in this title shall be construed to impair or diminish the power of any State commission.

* * * * * * *

"Now, all of those provisions, when you analyze them, are complements to State regulation and in no way supersede State regulation" (Hearings, p. 519).

"Mr. Bulwinkle: The reason I asked, Mr. DeVane, I notice in the papers that the Georgia Utilities Commission announced that they were coming to Washington to fight this bill.

"Mr. Chairman: Yes; on the theory that it was taking away from them some of their jurisdiction; not on any other theory, because I think I have talked with practically every Congressman from Georgia or every one of them has talked to me about it, and upon being assured that this bill did not take jurisdiction away from their commission, they seemed to be perfectly satisfied.

"Mr. DeVane: Due to the error that occurred in subsection 201(a) there was plenty of justification for the effort that has been made to convince State commissions that it was the purpose of this bill to take power away from them, and that representation could be fairly made to them, and since the bill has been introduced, I have heard it stated that was the concealed purpose of this commission, and probably might be the intention of Congress; but I want to make it perfectly clear here that it is not the purpose or desire of the Commission, and we trust that when the legislation comes out of Congress that it will leave to the State commissions as much authority as can be left with them.

"The Chairman: And you want the act to be perfectly clear on that point.

"Mr. DeVane: I want the act to be perfectly clear on that point" (Hearings, p. 529).

5. Hon. David E. Lilienthal, Director, Tennessee Valley Authority (Hearings, p. 2062), testified:

"Mr. Cooper: You think then that the Federal Government ought to supplant the State commissions in regulation of utilities?

"Mr. Lilienthal: Oh, no" (Hearings, p. 2062).

6. Hon. H. Lester Hooker, Chairman Legislative Committee National Association of Railroad and Utility Commissioners (Hearings, p. 1605), testified:

> "It has been repeatedly stated, by all of the representatives of the proponents of this bill who have appeared before this committee, that the avowed purpose of this legislation is merely a 'supplement,' or to 'fill in a gap' in State regulation, and not to supplant, supersede, or duplicate the regulation within the power of the States in any respect. It has been stated time and again by the proponents that it is their desire to leave unaffected and unimpaired the entire field to the maximum extent to which the States may be able to deal with this matter * * *" (Hearings, p. 1611).

7. Senator Burton K. Wheeler, Chairman of the Senate Committee, considering the Bill stated to his committee:

> "The Chairman: I do not think there is any intention to break down the local regulatory bodies. On the contrary, I think the drafters of the bill intended to strengthen the State commissions" (Senate Hearings, p. 764).

8. Senator Shipstead, Part 8, Vol. 79, p. 8395.

> "* * * but I desire to say to the Senator from New Jersey (Mr. Barbour) that the thought

of the committee was not to interfere within a state, but to leave all utilities within a State to be regulated by a state commission. * * *"

9. Senator Woodrum, Vol. 79, Part 9, p. 10574.

"It has been repeatedly stated by sponsors of this legislation—and I mean by 'this legislation' either the committee amendment or the Senate bill—that the bill is not intended to interfere with the right of any state to regulate business within its borders, but simply to supplement state regulation where it is necessary. In fact, it is stated in this declaration of policy in part II of the act that its purpose is to extend only to those matters which are not subject to regulation by the states."

Since Petitioner's accounts and accounting system are actually being regulated by the State of Kentucky, we submit that the Commission has no jurisdiction over them.

The Court below held that the Company's accounts and accounting system were subject to the jurisdiction of the Federal Commission, and suggested that such accounts and accounting system might also be subject to State jurisdiction. This is unthinkable. You cannot have dual control of a system of accounts anymore than you can have dual control of the steering wheel of an automobile. The present case affords a perfect example, *i. e.,* it was alleged in the verified Response to the order to show cause, in the Petition for Rehearing to the Commission and in the petition in

the Court below, and no where denied, that under the system of accounts and rules and regulations of the Kentucky Commission, the Company is required to keep the $601,973.57 in its electric plant account, and to not charge it to surplus. The Kentucky Commission's Order of September 16, 1941, issued pursuant to the reclassification of property in accordance with the provisions of the uniform system of accounts specifically required the Company to classify the $601,973.57 to its Electric Plant account, as part of its cost of the property. The Federal Commission's 1939 Order is directly to the contrary. The Company cannot serve two masters giving contrary orders anymore than an individual can serve both "God and Mammon."

The question of the jurisdiction of the Federal Commission over an electric utility company's accounts and accounting system is not only important to this Company, but to every other electric utility.

The Court below held that Section 301 (a) of the 1935 Act (16 U. S. C. A. 825) gave the Commission jurisdiction over the Company's accounts and accounting system. The language in this section is general, and does not specifically limit such jurisdiction to companies whose systems of accounts are not subject to State regulation. However, this general language does not broaden the specific language in the first section of the Act copied above. Each time the Act speaks on a subject it does not repeat the limits in Part II of the Act copied above that "such Federal regulation however to extend only to those matters which are not subject to regulation by the States." For instance, Sec-

tion 209 of the Act (16 U. S. C. A. 824 (e) (a)), with reference to the all important subject of rates, is also general and does not limit such jurisdiction to interstate rates; however, Commissioner Seavey of the Commission and Senator Wheeler, both, said that regardless of general language it must be understood that the jurisdiction extended only to interstate matters which could not be regulated by the States.

Part 8, Vol. 79, p. 8431:

> "Mr. Borah: I understand that it is not the intention of the framers and proponents of the measure to deal with intrastate matters at all.
>
> "Mr. Wheeler: That is correct.
>
> "Mr. Borah: If the general language used could be construed as dealing with intrastate matters, nevertheless the intention is to confine the operation of the bill to interstate matters?
>
> "Mr. Wheeler: That is entirely correct (Part 8, Vol. 79, p. 8431).
>
> "Mr. Merritt: Returning for a moment to section 209—
>
> "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, facilities, or service—
>
> "And so forth.
>
> "That does not say anything about interstate commerce; but is that inferred?
>
> "Commissioner Seavey: Yes; the jurisdiction only goes to interstate and if there is any doubt about that, language should be put in there; but it is believed that covers it" (Hearings, p. 410).

"The Chairman: Then could there be any good reason why there should not be some authority that would control that the States cannot control?

"Commissioner Seavey: I do not know of any reason why.

"The Chairman: And is not that what you are talking about?

"Commissioner Seavey: That is what I am talking about.

"The Chairman: And that you are driving at here by this law, whatever the language, to control that part of this business that the States themselves cannot control and that the States themselves would not control, in order that it might help them control the things that are in their States?

"Commissioner Seavey: That is true.

"The Chairman: And that is what you are offering here as an amendment to the present law.

"Commissioner Seavey: Yes" (Hearings, p. 427).

From the above it is submitted that the Commission does not have jurisdiction over the Company's accounts and accounting system nor jurisdiction to require it to charge the $601,973.57 to surplus. This money was actually and in good faith spent on the Project. Securities representing these dollars are outstanding in the hands of the public. The actual cost of the Project should remain in the Company's accounts and not be taken out of such accounts by a charge to surplus. What part of the original cost of the Project the Public Service Commission of Kentucky may allow in rates, se-

curities to be issued, etc., is another matter and within the discretion of that Commission; likewise what part of such original cost the Federal Power Commission may allow in amortization reserves, etc., is another matter and within the discretion of that Commission.

This question got off to a bad start, *i. e.*, the Seventh Circuit Court of Appeals in *Northern States Power Company* v. *Federal Power Commission,* 118 F. (2d) 144, and the Court of Appeals for the District of Columbia in *Alabama Power Company* v. *Federal Power Commission,* 128 F. (2d) 280, have held that the Commission had jurisdiction over electric utility accounts and accounting systems; however, neither of these courts considered or at least they did not refer to the Congressional enactment that Federal regulation was limited to "those matters which are not subject to regulation by the States," nor did they refer to the testimony copied above by proponents of the 1935 Federal Power Act that it was the purpose of the Act to regulate what the States could not regulate and to complement and not supersede State regulation.[4]

[4]Since writing this brief we have read a copy of the opinion of the Second Circuit Court of Appeals rendered November 25, 1942 in the case of *Hartford Electric Company* v. *Federal Power Commission.* (Not yet officially reported.)

POINT II.

The 1933 and 1937 Orders of the Commission Were Mere "Determinations" or "Findings" of Cost or Value, and Were Not Appealable Until Used in the 1939 Order to Require a Charge to Surplus.

The Court below erroneously dismissed the appeal in so far as it applied to the 1933 and 1937 Orders on the ground that the Company should have known that these Orders required a charge to surplus; that the Orders therefore adversely affected the Company and that appeals should have been, but were not taken from such Orders within the time prescribed by Sections 313 (a) (b) of the 1935 Act (16 U. S. C. A. 825 l).

Both the 1933 and the 1937 Orders were and were styled mere "determinations" of the "actual legitimate original cost" of Project 289. They can be searched from stem to stern, and there will not be found in them one word of direction to the Company to do other than make a mere bookkeeping entry of the Commission's "determination." They were nothing but determinations of cost or value to be used subsequently by the Commission in matters as to which the Commission had jurisdiction, *i. e.,* amortization reserves, purchase or recapture by the Government, compensation for emergency taking over, etc. In *United States* v. *Los Angeles R. R. Co.,* 273 U. S. 299, this Court in an opinion by Mr. Justice Brandeis held that an order of the Interstate Commerce Commission making a "finding" or "determination" of value was not reviewable by the Court unless and until such "determi-

nation" or "finding" was subsequently used to the Company's detriment.

> (p. 309) "The final report on value, like the tentative report, is called an order. But there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act. * * *
>
> *"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not* change the carrier's existing or future status or condition; which does not determine any right or obligation. *This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation.* Compare *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later. *It was merely preparation for possible action in some proceeding which may be instituted in the future*—preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action shall arise."
>
> * * * * *

(p. 314) "No basis is laid for relief under the general equity powers. The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction. * * *"

The decision of the Court below is in direct conflict with the above decision by this Court. It is also in conflict with this Court's decisions in *State Corporation Commission of Kansas* v. *Wichita Gas Company,* 290 U. S. 561; *Rochester Telephone Corporation* v. *United States, et al.,* 307 U. S. 125; *Federal Power Commission* v. *Pacific Power & Light Co.,* 307 U. S. 156, as to the reviewability of orders of a regulatory body.

In addition, it was shown to the Court below that the then Commission composed of a different personnel and staff was publicly contending as we are contending, *i. e.,* that similar orders of the Commission making "determinations" of the "actual legitimate original cost" of licensed projects were not reviewable by the Courts unless and until they were subsequently used to the licensee's detriment.

As was shown to the Court below (R., Vol. III, p. 1474) the writer was first employed in this case immediately after the 1937 order, and his opinion was asked as to whether or not an appeal could then be

taken to the Court. The writer reviewed all of the authorities that could be found on the subject, and in a written opinion advised the client that no appeal could then be taken. At that time all of the cases and the Federal Power Commission itself were in agreement with this opinion. The opinion letter shows the following quotation from the case of *Clarion River Power Co.* v. *Smith, et al.,* 59 F. (2d) 861:

> p. 863. "* * * It is, we think, apparent that, if the commission is intelligently to exercise such extensive regulatory and supervisory powers, the authority to determine the net investment of any project is absolutely necessary. *Such a determination is purely administrative* in character, and is not to be confused with the judicial determination which takes place for another purpose at the end of the license period. * * *"

Also the following quotation from *Alabama Power Co.* v. *Smith, et al.,* decided by the Supreme Court of the District of Columbia July 17, 1935: (This is an unpublished opinion and we cannot even locate it now, but the letter to the client shows that it was found in Commerce Clearing House Public Utilities and Carrier Service, Sec. 17033.)

> "That the Commission has the power to investigate the cost of the plaintiff's project is settled by the case of *Clarion River Power Co.* v. *Smith,* 59 Fed. (2d) 861. It would be a futile act to make the investigation and no finding based upon it. *This finding is an administrative and not a judicial act, and does not bind the plaintiff.*"

The letter also referred to the cases of *State Corporation Commission of Kansas, et al.*, v. *Wichita Gas Company*, 290 U. S. 561 and 562, and *United States* v. *Los Angeles R. R. Company*, 273 U. S. 299.

In addition, before giving our written opinion, we found that the then Commission and its then staff were also of this opinion. That is, we found from the case of the *Clarion River Power Company* v. *Smith, et al.*, 59 F. (2d) 861, referred to above that Mr. William Marshall Bullitt, an attorney of Louisville (presently, one of the writer's partners), was attorney for the Clarion Company. Being anxious to get everything available on the subject, we secured from Mr. Bullitt his entire record in the case. It showed that the opinion reported in 59 F. (2d) 861 was an appeal of a case that had been filed in the Supreme Court of the District of Columbia by the Clarion Company against Patrick J. Hurley and other members of the Federal Power Commission (Equity No. 52024). (This District of Columbia case is referred to in the opinion below as being reported in 59 Wash. Law Rep. 106.) The record showed that the Clarion River Company was the owner of a licensed project, that it had submitted its statement of "actual legitimate original cost"; that the Commission's Staff had recommended the disallowance of $11,000,000; that the Commission had set the case for hearing but that the Clarion River Company a few days prior thereto filed the above suit, asking that the Commission be enjoined from holding the hearings or from making any adjudication of the cost of the project. The record shows that the case

was heard before the Court on December 8, 1930, on the Clarion Company's motion for a temporary injunction and on the Commission's Motion to Dismiss. The printed "Transcript of Proceedings on Motion to Dismiss" showed that Mr. Charles A. Russell, the then attorney for the Commission argued that if as a result of the proposed hearing the Commission made an order identical with our 1933 and 1937 orders, *i. e.,* determining costs, eliminating certain claimed amounts and directing that the Commission's action be entered on the Company's books that even then under the decision of this Court in the *Los Angeles R. R. Case,* 273 U. S. 299, referred to above, he did not think an appeal would lie from such an order. Mr. Russell stated:

> (p. 30) "Mr. Russell: Order it then as the final net investment.
>
> "The Court: Then there would be a final order?
>
> "Mr. Russell: Then there would be a final order on that, but even when we come to that, your Honor, I am satisfied that final order is not reviewable in the face of this decision of the Interstate Commerce Commission."
>
> (p. 31) "* * * But notwithstanding that, I say that under this decision that until we make an order that affects some right—and what that right is is going to be for the Court to ultimately determine—whether on a bare order that they shall enter that in their books as the net investment I am not prepared to say, but I have serious doubts that that is an order that can be reviewed; but if, after making the order that we do require them to enter it in the books, we then undertake to

regulate the rates, or we undertake to recover excess earnings, or regulate the issuance of securities, the moment that we use that finding as a basis to compel them to do somethiing with reference to rates, that would be in the nature of due process of law, I am rather fearful the Court would not have any jurisdiction, although I may be mistaken. * * *"

Of course, Mr. Russell would not have made the above argument if the Commission or its staff had thought that the Order meant that the disallowed amount of $11,000,000 should be charged to surplus.

The opinion of the Court below is in error in saying that we "had already been advised of a judicial determination in Clarion River Power Company v. Hurley, *supra;* that the scope of the Commission's authority included power to direct that disallowed items of cost should not be retained in the capital accounts." Respectfully, we submit that this Clarion River case did not so advise us because the suit was to prevent a hearing as to what, if any, items should be disallowed. The Commission had made no order in the premises, and it argued that the order that it would make would not even be an appealable order.

As will be shown hereafter at page 43, the Commission used the Clarion River Power Company case as authority for its argument that an order making a "determination" of "actual legitimate original cost" was "purely administrative in character," and could not be appealed to the Court.

The opinion below refers to *Alabama Power Company* v. *McNinch,* 94 F. (2d) 601 (App. D. C.). The Alabama opinion was not published until after January 6, 1938, and so we did not have the benefit of it when we gave our opinion as to the 1937 Order. However, subsequent investigation of the Alabama case shows again that the then Commission and its then staff argued extensively that an Order of the Commission identical with our 1933 and 1937 Orders were not appealable because such an order did not hurt the owner of the license.

The reported opinion in the Alabama Power Company (94 F. (2d) 601, 604) case shows that the Commission Order therein involved was identical with the Commission's 1933 and 1937 Orders in our case regarding the bookkeeping entry, *i. e.,* it directed as in our case:

> "* * * the Power Company to establish accounts showing the actual legitimate original cost of a hydro-electric project owned by the Power Company to be the sum determined by the Commission as such cost, and requiring the Power Company to establish and maintain subsidiary accounts and records to substantiate all entries making up such total cost."

The record in the Alabama Power Company case shows that on June 26, 1933, the Federal Power Commission filed a motion to dismiss in the Supreme Court of the District of Columbia and, among other reasons, stated:

"4. That action on the part of the defendants complained of does not involve a final order of the Federal Power Commission and cannot be reviewed by the Courts."

The Commission's brief on the Motion to Dismiss, filed November 3, 1933, states:

"The decision and orders involved were administrative determinations and not to be confused with the later determinations which would be subject to judicial review (*Clarion River Power Company* v. *Smith, et al.*, 59 Fed. (2d) 861): there can be no deprivation of any right or property of the plaintiff at this time; and a full, complete, and adequate remedy is open to this plaintiff to test the validity of the Commission's decision and orders if and when they should be used."

p. 10. "* * * A similar opportunity would be afforded this plaintiff for presentation of every contention made in the bill of complaint if and when the Federal Power Commission should seek, under the provisions of Section 26 of the Act, to compel compliance with its order or accomplish revocation of plaintiff's license; or should seek, under Section 19 and 20, to regulate the rates or control the security issues of plaintiff, or, under the provisions of Section 10 (d), should require establishment by plaintiff of amortization reserves; or under the provisions of Section 14, should undertake to recapture the licensed property. Since none of these measures can be attempted at this time, the present action is premature and when the Commission proceeds under the Act an adequate remedy is available to plaintiff."

The Federal Power Commission filed its brief on June 11, 1935, "In support of defendant's answer," and said:

"The Jurisdiction of this Court.

(p. 4) "Defendants are content to accept this court's decision overruling their motion to dismiss the bill; they are willing and ready to meet plaintiff's case on its merits. However, a decision of the Supreme Court which was handed down only ten days after this court overruled the defendants' motion in the case at bar strengthens our former doubt as to this court's jurisdiction. We therefore regard it as our duty to this court to renew the motion to dismiss on the ground that plaintiff has suffered no real injury from the order in question, and to discuss briefly the authorities that lead us to this conclusion. The decision referred to is State Corporation Commission of Kansas v. Wichita Gas Co., 290 U. S. 561, decided January 8, 1934. * * *

"A determination by the Federal Power Commission such as that involved in the present case has been described by the Court of Appeals of the District of Columbia as 'purely administrative in character, and * * * not to be confused with the judicial determination which takes place for another purpose at the end of the license period.' *Clarion River Power Co.* v. *Smith,* 59 F. (2d) 861, 863. The order involved in the *Wichita* case was described by the Supreme Court as 'legislative in character'; 'The Commission's decisions upon the matters covered by it cannot be *res adjudicata* when challenged in a confiscation case or other

suit involving their validity or the validity of any rate depending upon them.' (290 U. S. at 569.) The parallel between the two cases is clear.

"The question now presented thus narrows down to that of the Commission's authority to issue the purely administrative order requiring the company to set up on its accounts the figure which the Commission has determined to be the actual legitimate original cost of its property under license. In deciding that question, this Court is not to decide whether the cost figure found by the Commission may legally be employed as the basis for recapture, security issues, or rate making."

Of course, the above negatives any claim that the Commission which issued the orders thought that the orders carried a direction that the disallowed amount be charged to surplus. We are certain that the then Commission and its then staff was sincere in contending just as we are contending that Orders making a "determination" of the cost of a licensed project did not carry any direction or implication that the disallowed amount should be charged to surplus. Our objection is that the decision of the Court below denies us a judicial review of the 1933 and 1937 Orders because of the Court's opinion that we should have known what the then Commission and its then staff who made the Orders did not know, *i. e.*, that the Orders carried a direction of a charge to surplus.

The Commission's "show cause" order of April 4, 1939, was the first intimation from the Commission that it thought the disallowed amount should be charged to

surplus. Up until 1939, or for a period of nineteen years, the Commission had never theretofore claimed that the disallowed amount should be charged to surplus. This is a "powerful indication" that the Commission had no authority to make such an order.

Federal Trade Commission v. *Bunte Brothers,* 312 U. S. 349.

> (p. 351) "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. * * *"

We ascribe perfect sincerity to the present Commission and its present Staff. Our point is that neither the present Commission nor the Court should penalize us for thinking as did the then Commission and its then Staff.

We submit that the Order of the Court below was erroneous in dismissing the appeal as to the 1933 and 1937 Orders.

POINT III.

The 1939 Order Attempting to Require that the Disallowed Amount of $601,973.57 be Charged to Surplus Was Entered Without a Hearing of Any Kind on the Legality or Propriety of the Order. It Is Therefore Void Because of a Denial of Due Process.

The hearings prior to the 1933 and 1937 Orders related solely to the question of what was and what was not "actual legitimate original cost." There is not one syllable of testimony or a line of brief or argument on either side to put the Company on notice that any amount that the Commission disallowed should be charged to surplus. The Kentucky Commission's system of accounts and its specific order of September 16, 1941, require that the $601,973.57 should be kept in the electric Company's account and not charged to surplus. There is nothing in the Federal Commission's system of accounts which would require that the disallowed amount should be charged to surplus. In the case of *Northern States Power Company* v. *Federal Power Commission,* 118 F. (2d) 141 (C. C. A. 7), Mr. Charles W. Smith, Chief of the Commission's Bureau, Accounts, Finance and Rates, and an eminent authority thus testified on September 26, 1939, as to the devious, dubious and doubtful reasoning from which the present Commission contends that its system of accounts requires the charge of disallowed amounts to surplus!

"Q. Is such treatment required in the Federal Power Commission's uniform system of accounts?

"A. I believe so.

"Q. Will you refer to the Commission's Uniform System of Accounts and indicate the instructions and accounts provided for this depreciation?

"A. I refer particularly to General Instrution 2-F appearing on page 9 of the Commission's uniform System of Accounts. That instruction reads as follows: 'All charges to the accounts prescribed in this system for electric plants, income, operating revenues, and operating expenses shall be just and reasonable, and no payments by the utility in excess of just and reasonable charges shall be included in account 538, "Miscellaneous Income Deductions."'

"Miscellaneous Income Deductions is an account for the transactions of the current year. Thus where in a system of accounts we find that the delayed items, that is items that relate to the past years instead of going into account 538 and then to surplus go to surplus direct. There is no difference in the principle involved in this matter.

"Q. As to unjust and unreasonable items which occurred in the previous year, is the account to which such unjust and unreasonable items are chargeable, account 414, which is shown on page 86 of the System of Accounts?

"A. That is right. The item should be charged to account 414, Miscellaneous Debits to Surplus. Of course, charges to the income account all go to surplus. The income account, however, is for the current year, and where you have large items which relate to past years, the preferable principle is to charge those items directly to surplus rather than indirectly to account 538. The final resting place, of course, is the same in both cases.

"But to continue the answer to your question as to other provisions of the System of Accounts, I would like to call your attention to the instruction on page 3 under the heading 'Applicability of System of Accounts,' and particularly to the last paragraph of that statement:

" 'In accordance with the requirements of section 3 of the Act, the classification "Investment in Road and Equipment of Steam Roads, Issue of 1914, Interstate Commerce Commission," is published and promulgated as a part of the accounting rules and regulations of the Commission, and a copy thereof is appended hereto as Appendix II. Irrespective of any rules and regulations contained in this system of accounts, the cost of original projects licensed under the Act, and also the cost of additions thereto and betterments thereof, shall be determined under the rules and principles as defined and interpreted in said classification of the Interstate Commerce Commission so far as applicable.'

"I would like to call your attention also to General Instruction No. 9, appearing on page 10 of the Uniform System of Accounts, and the instruction provides that separate accounts must be kept to show the actual legitimate cost of each project, and the cost of operating each project."

Half of this Company's surplus should not be taken away from it on such thin and arbitrary accounting reasoning and without any hearing thereon. This is so in conflict with the decisions of this Court on the requisites of due process that we merely mention the

cases of *Morgan, et al.*, v. *United States*, 304 U. S. 1, 18; *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 304.

CONCLUSION.

WHEREFORE, Petitioner submits that the petition herein should be granted because the final determination by this Court of the questions of law involved in this case is of utmost importance to the Company not only, but to electric companies generally in the matter of settlement of State and Federal jurisdiction over such company's accounts and accounting system.

The petition for a writ of certiorari should be granted and the decision of the Court below set aside.

Respectfully submitted,

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OCTOBER TERM, 1942

No. 616

LOUISVILLE GAS AND ELECTRIC CO., PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals (3 R. 1460–1472)[1] is reported in 129 F. (2d) 126. The opinion and orders of the Commission are set forth in the record at 2 R. 963–1000, 1256–1257, and 1293–1295.

JURISDICTION

The judgment of the Circuit Court of Appeals (3 R. 1459) was entered on June 29, 1942. A

[1] The three volumes of printed record filed with the petition in this case will be referred to as 1 R, 2 R, and 3 R, respectively.

petition for rehearing (3 R. 1473–1499) was denied on October 6, 1942 (3 R. 1499). The petition for a writ of certiorari was filed on January 4, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Following extensive hearings, the Federal Power Commission, by opinion and two orders, determined (pursuant to sections 3 (13) and 4 (b) of the Federal Power Act) the actual legitimate original cost of petitioner's licensed hydroelectric project, disallowing certain items claimed as such cost by petitioner, and required the setting up of accounts to reflect this determination. Petitioner sought no court review of these orders, but purported to comply with them. Petitioner, however, in so doing, failed to remove the disallowed items of claimed cost from its accounts. Thereafter, the Commission ordered petitioner to show cause why the disallowed amounts should not be charged to petitioner's surplus account, and, after petitioner's response, found that no cause had been shown and entered a third order requiring petitioner to charge the disallowed amounts to surplus. On review by the court below, this order of the Commission was affirmed, the court dismissing the review of the first two orders which determined the cost of the project and required petitioner to reflect that cost in its accounts. The questions are:

1. Whether the Commission has jurisdiction to require a licensee under the Act to correct its accounts so as to reflect the Commission's cost determination by charging the disallowed items of claimed cost to surplus.

2. Whether the court below properly dismissed for lack of jurisdiction the petition for review of the Commission's first two orders with which petitioner had purported to comply.[2]

STATUTES INVOLVED

The relevant provisions of the Federal Power Act of 1935 are set forth in the Appendix, *infra.*

STATEMENT

On November 11, 1925, the Federal Power Commission issued a license under The Federal Water Power Act to the Louisville Hydro-Electric Company (hereafter called Hydro) for the Ohio Falls Hydroelectric Project No. 289 on the Ohio River near Louisville, Kentucky (1 R. 15–39). On October 17, 1934, the license was transferred, with the approval of the Federal Power Commission, to petitioner Louisville Gas and Electric Company (1 R. 40–45) and, by the terms of the transfer, petitioner accepted "all the provisions and conditions of the Federal Water Power Act of June 10, 1920," (*cf.* Sec. 8 of that Act.

[2] In the event the petition for certiorari is granted we reserve the right to urge the correctness of the Commission's cost determination.

Appendix, *infra,* p. 18) and agreed to "establish and maintain books and accounts in accordance with the prescribed system of accounts adopted by the Commission" and to "enter therein such items as may from time to time be determined by the Commission" (1 R. 41–43).

Pursuant to the provisions of The Federal Water Power Act and of the license (1 R. 23–24), Hydro, on February 10, 1930, filed with the Commission a verified statement claiming $7,829,738.72 as the actual legitimate original cost of the project as of November 30, 1929 (1 R. 46–90). The results of an audit by the Commission staff were embodied in a preliminary accounting report (1 R. 91–162) in which it was recommended that $6,919,681.11 of the claimed cost be allowed (1 R. 105). The items making up the $910,057.61 balance of the claimed cost were suspended and proposed for elimination, the objections being set forth in detail opposite each questioned item (1 R. 107–137). This report was served on the licensee (1 R. 91) which filed its protest thereto and requested a hearing (1 R. 162–265). Thereupon, pursuant to the Commission's order (1 R. 266–268), a hearing before the full Commission was held on October 19–22, 1932 (1 R. 283–565). Extended testimony and numerous exhibits (1 R. 567–956) were introduced and thereafter detailed briefs were filed (2 R. 967). On October 31, 1933, the Commission rendered an opinion (2 R. 963–

1000) and entered its first order determining the actual legitimate original cost of the project (2 R. 1000–1005). In so doing the Commission found and allowed $6,996,093.52 and disallowed $833,645.20 of the $7,829,738.72 claimed by the company. The amounts disallowed were held not to "represent proper and reasonable costs of construction of said project" (2 R. 1004). The order required (2 R. 1004–1005):

1. That the licensee establish and maintain control ledger sheets or accounts with reference to said project showing a total debit balance in its fixed capital accounts beginning with an entry of $6,996,093.52 as actual legitimate original cost of said project as of November 30, 1929;

2. That the licensee establish and maintain subsidiary ledger sheets or accounts or records, showing and substantiating all entries in such control account, and classifying the total for fixed capital in appropriate detail and in accordance with the Commission's rules and regulations;

3. That the licensee comply with this order within 90 days of its service.

Prior to the expiration of the period for complying with the above order, the company applied for and received an extension of time within which to apply for a rehearing (2 R. 1005–1007). Thereafter, several applications for rehearing were filed and various postponements were granted by the Commission (2 R. 1008–1016, 1016–

1018, 1087–1088, 1112–1119, 1123, 1124–1131). Finally, a rehearing on certain of the disallowed items was set by Commission order of December 15, 1936, more than 3 years after the original cost order (2 R. 1135–1136). Following the rehearing on January 6, 1937 (2 R. 1137–1221) the Commission, on the basis of the additional testimony, various statements filed by the licensee, and briefs of counsel, entered a second order on September 30, 1937 (2 R. 1256–1259, see also 3 R. 1461), allowing an additional amount of $208,879.33 as part of actual legitimate original cost together with $13,215.82 for interest during construction. Thus, of the total amount claimed by the company, $7,218,188.67 was allowed and $611,550.05 was disallowed. The company was ordered to conform its books of accounts accordingly (2 R. 1257).

Petitioner did not apply under Section 313 of the Federal Power Act for a rehearing of this order, nor did it seek a court review of the 1933 order as modified by the 1937 order. Instead, petitioner undertook, on September 12, 1938, to comply with the Commission's orders by making "the journal entries to adjust [its] books in accordance with the Commission's orders of October 31, 1933 and September 30, 1937" (2 R. 1260). On the same date, petitioner transmitted to the respondent F. P. C. Form No. 76 (2 R. 1261–1269) showing "the adjusting journal entries made by licensee in order to comply with requirement that the licensee's books of account be

brought into agreement with actual legitimate original cost of project plant as determined by the Commission" (2 R. 1265).

Of the $611,550.05 which had been disallowed, $9,576.48 pertained to nonproject property and in the Commission's view was properly transferred by petitioner to the appropriate nonproject account (2 R. 1266). The $601,973.57 balance did not pertain to any nonproject property and therefore could not be transferred to any nonproject account. However, petitioner failed to remove that amount from its accounts (2 R. 1265–1267).

Accordingly, on April 4, 1939, the Commission ordered petitioner to show cause why the $601,973.57 should not be "transferred as a charge against the company's appropriate surplus account in accordance with the Commission's orders of October 31, 1933, and September 30, 1937, and the provisions of the Uniform System of Accounts prescribed for public utilities and licensees" (2 R. 1270–1272). After applying for and receiving an extension of time (2 R. 1273–1278), petitioner filed a detailed response to the order to show cause (2 R. 1279–1292) in which petitioner set forth numerous legal arguments, but failed to proffer or indicate any accounting or other testimony as to the disposition of the disallowed items. No request or suggestion for a further hearing was made.

On October 31, 1939, the Commission entered its third dispositive order (2 R. 1293–1295) finding

that no cause had been shown and requiring petitioner to charge the $601,973.57 against its earned surplus account. On December 4, 1939, petitioner filed a petition for rehearing (2 R. 1295–1330) which was automatically denied under Section 313 (a) of the Act when the Commission failed to act upon it within thirty days.

Thereupon, pursuant to Section 313 (b) of the Act, petitioner filed a petition for review in the court below (3 R. 1337–1427). The Commission moved to dismiss the review of the 1933 order as amended by the 1937 order because petitioner had not applied for rehearing or sought a timely court review under Section 313 of the Act as to those orders (3 R. 1455–1458). This motion was passed until the hearing of the case on the merits (3 R. 1459).

After the hearing, the court below dismissed the petition insofar as it sought review of the 1933 order as amended by the 1937 order and held that the accounting disposition of the disallowed items made by the Commission was in all respects proper. Accordingly, a judgment affirming the 1939 order of the Commission was entered on June 29, 1942 (3 R. 1459). A petition for rehearing (3 R. 1473–1499) was denied on October 6, 1942 (3 R. 1499).

ARGUMENT

Petitioner contends (Pet. 20–34) that the court below erred in affirming the Commission's juris-

diction to prescribe the accounting disposition to be made of the disallowed items of claimed cost. Petitioner further contends (Pet. 35–46) that the court below erred in dismissing the petition for review of the Commission's 1933 order as modified by the 1937 order which determined the actual legitimate original cost of the project and required petitioner to set up its accounts accordingly. These contentions are without merit.

1. Petitioner's contention that the Commission was without jurisdiction to enter such accounting order on the ground that its accounts were subject to regulation by the states, and federal regulation is limited to those matters which are not subject to state regulation (Pet. 21–34) is plainly without substance. The Act clearly contemplates that the accounting requirements prescribed by the Commission shall exist side by side with state requirements for keeping accounts. *Cf. Alabama Power Co.* v. *Federal Power Commission,* 128 F. (2d) 280 (App. D. C.), certiorari denied, No. 229, this Term, October 12, 1942. Thus Section 301 (a) authorizes the Commission to prescribe a system of accounts with which every licensee is required to comply.[3] And the same section also

[3] Section 4 (b) of the Act requires that upon completion of a licensed project the licensee shall file with the Commission a statement, under oath, "showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands," and authorizes the Com-

provides explicitly that "nothing in this Act shall relieve any public utility from keeping any accounts * * * which such public utility may be required to keep by or under authority of the laws of any State." *Cf.* also Section 302 (b). The corrective accounting prescribed by the Commission in no way infringes on state authority since "each

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mission "to determine the actual legitimate original cost of and the net investment in" such project. Section 3 (13) defines "net investment" in a project as the actual legitimate original cost thereof, plus cost of additions and betterments and less certain deductions not here involved.

The effectuation of many of the purposes of the Act depends on the licensee's accounts correctly reflecting the Commission's determination of actual legitimate original cost. Thus, for example, actual legitimate cost is the basis upon which excessive profits are determined and expropriated. During the first twenty years the license is in force such profits may be expropriated to the Government under Section 10 (e) of the Act by increasing the annual charges paid by the licensee. After the first twenty years of operation excessive profits are segregated in an amortization reserve under Section 10 (d) for use in reduction of the licensee's net investment in the project. Actual legitimate original cost also constitutes the rate base used by the Commission in fixing intrastate rates (under Section 19) which are not regulated by the states and in regulating interstate rates (under Section 20). Actual legitimate original cost likewise controls the "just and fair compensation" paid a licensee under Section 16 for use of its project in a war or other emergency "involving the safety of the United States." The amount allowed by the Commission as actual legitimate original cost determines the price the Government pays a licensee upon acquisition of its project at the expiration of the license under Section 14 or upon a court sale of the project, following a revocation of the license under Section

commission is empowered to act within its own field." *Northern States Power Co.* v. *Federal Power Commission,* 118 F. (2d) 141, 144 (C. C. A. 7); *Northwestern Electric Co.* v. *Federal Power Commission,* 125 F. (2d) 882, 885 (C. C. A. 9); *Alabama Power Co.* v. *Federal Power Commission,* 128 F. (2d) 280 (App. D. C.), certiorari denied, No. 229, this Term, October 12, 1942; see S. Rep. No. 621, 74th Cong., 1st sess., p. 53. As the court below pointed out (3 R. 1469), the Act "discloses a purpose that the Commission shall prescribe such accounting system, notwithstanding that the state has required a like or a different system of accounts." And, as was pointed out in *Alabama Power Co.* v. *Federal Power Commission, supra,* the state can require petitioner to keep a separate set of books for purposes of

26. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 427–428; *Clarion River Power Co.* v. *Smith*, 59 F. (2d) 861 (App. D. C.), certiorari denied, 287 U. S. 639.

Any accounting disposition of the disallowed items which would not eliminate them from the company's accounts would run counter to the objectives of the Act. As the court below recognized, the elimination of "items found not to constitute real assets * * * is the necessary implication of the Act" (3 R. 1470). And similar Commission orders issued under Section 301 requiring the disallowed items to be charged to surplus have been uniformly upheld. *Alabama Power Co.* v. *McNinch*, 94 F. (2d) 601 (App. D. C.); *Northern States Power Co.* v. *Federal Power Commission, supra; Alabama Power Co.* v. *Federal Power Commission, supra;* compare *Kansas City So. Ry. Co.* v. *United States*, 231 U. S. 423, 440; *Norfolk & Western Ry. Co.* v. *United States*, 287 U. S. 134, 141.

state law and if the company chooses it may keep a third set for its own purposes.

Petitioner's reference to Section 201 (a) of Part II of the Federal Power Act which provides for federal regulation of the transmission and sale at wholesale of electric energy in interstate commerce, "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States," is obviously irrelevant. Section 201 (a) deals with regulation of electric utilities engaged in interstate commerce under Part II of the Federal Power Act and has no application to the Commission's jurisdiction over hydroelectric projects licensed under Part I. Every court that has considered similar orders of the Commission has upheld the Commission's jurisdiction to prescribe the accounting disposition of the disallowed items of claimed cost. *Alabama Power Co.* v. *McNinch,* 94 F. (2d) 601, 604 (App. D. C.); *Northern States Power Co.* v. *Federal Power Commission,* 118 F. (2d) 141 (C. C. A. 7); *Alabama Power Co.* v. *Federal Power Commission,* 128 F. (2d) 280 (App. D. C.), certiorari denied, No. 229, this Term, October 12, 1942.

Petitioner's contention (Pet. 47–50) that, despite the extended proceedings in this case, the order requiring disposition of the disallowed amounts was entered without notice and hearing is without merit. Before entering such order,

the Commission gave petitioner full opportunity to show cause why the accounting requirements should not be made effective (2 R. 1270–1272). Petitioner thereupon filed a detailed response (2 R. 1279–1292) setting forth numerous legal arguments, but offering no accounting or other testimony. A further hearing was neither requested nor suggested. "It must be assumed that the response was as full and complete as it [petitioner] considered possible or appropriate" (3 R. 1471). The order to show cause was clearly sufficient. *Alabama Power Co.* v. *Federal Power Commission,* 128 F. (2d) 280 (App. D. C.), certiorari denied, No. 229, this Term, October 12, 1942; see also *Northwestern Electric Co.* v. *Federal Power Commission,* 125 F. (2d) 882 (C. C. A. 9).[4]

2. The court below properly dismissed the petition for review insofar as it sought to put in issue the propriety of the Commission's determination of actual legitimate original cost in its 1933 and 1937 orders. Section 313 (a) of the Federal Power Act precludes review of the Commission order unless application was made for a rehearing before the Commission and Section 313 (b) limits the time for review to sixty days following the order entered on the application for rehearing. It is undisputed that no timely court review was sought of the 1933 order as amended

[4] "The Fifth Amendment guarantees no particular form of procedure." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 351.

by the 1937 order and that no petition for rehearing of the 1937 order was made before the Commission. In those circumstances, petitioner is foreclosed from questioning the amount of actual legitimate original cost as determined by the Commission in those orders. *Cf. Ostler Candy Co.* v. *Federal Trade Commission,* 106 F. (2d) 962, 964 (C. C. A. 10), certiorari denied, 309 U. S. 675, and compare *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, 75–78; *Stoll* v. *Gottlieb,* 305 U. S. 165; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 166. Petitioner's contention that its failure to seek court review of the 1933 order as amended by the 1937 order [5] was excusable because they were not reviewable orders is clearly incorrect.[6] These

[5] The 1933 order did not become effective, because of the pendency of petitions for rehearing, until after it was modified by the 1937 order, following rehearing. There is therefore no question here as to the reviewability of the 1933 order except as modified by the 1937 order.

[6] In contending that the 1933 order as amended by the 1937 order was properly before the court below, counsel for petitioner asserts that the failure to seek review is attributable to the fact he advised petitioner in 1937 that the orders were not reviewable, and that such advice was confirmed by arguments which Commission counsel had made on preliminary motions in other cases (Pet. 37–46). Whether or not the 1933 and 1937 orders were in fact reviewable is, of course, a question the resolution of which is not affected by the contentions earlier made by Commission counsel in other cases. Compare *The Whiskey Cases,* 99 U. S. 594; *Buie* v. *United States,* 76 F. (2d) 848 (C. C. A. 5), certiorari denied, 296 U. S. 585, rehearing denied, 296 U. S. 662. And the fact that

orders differ significantly from that involved in *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309–310, which did "not command * * * [petitioner] to do, or to refrain from doing, anything." Here petitioner was expressly required to "establish and maintain control ledger sheets or accounts with reference to said project showing a total debit balance in its fixed capital accounts" of the amount found as the actual legitimate original cost and "to establish subsidiary ledger sheets or accounts or records, showing and substantiating all entries in such control account, and classifying the total for fixed capital in appropriate detail and in accordance with the Commission's rules and regulations" (2 R. 1004–1005). And penal sanctions might be invoked if petitioner failed to comply with the orders. *Cf.* Sections 304 (b) and 316. *Cf. Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 183. Accordingly, these orders were clearly reviewable. Compare *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; see also *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407.

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petitioner was advised that those orders were not reviewable is similarly of no assistance in resolving the question whether in fact they were reviewable. Moreover, it must be noted in passing that the extent of the advice which petitioner received on this question and the identity of its advisor (Pet. 37–46) are somewhat obscured when the record here presented (3 R. 1473–1476) is contrasted with counsel's affidavit on requesting an extension of time before the Federal Power Commission (2 R. 1276; see also 2 R. 1273–1274).

Indeed, prior to the 1935 amendments adding the present review provisions to the Act,[7] identical orders of the Commission had been reviewed by the courts in suits for injunction to restrain their enforcement. *Alabama Power Co.* v. *Smith,* 10 P. U. R. (N. S.) 275 (S. C. D. C.); *Alabama Power Co.* v. *McNinch,* 94 F. (2d) 601 (App. D. C.); see also *Clarion River Power Co.* v. *Smith,* 59 F. (2d) 861 (App. D. C.), certiorari denied, 287 U. S. 639.

CONCLUSION

The decision below is correct. There is no conflict, and the case presents no question calling for further review. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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JANUARY 1943.

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[7] By Title II of the Public Utility Act of 1935 (49 Stat. 838) the Federal Water Power Act of 1920, as amended, was made Part I of the Federal Power Act.

APPENDIX

FEDERAL POWER ACT OF 1935, 49 STAT. 838

Section 3 (13) (16 U. S. C. sec. 796 (13)):

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission," plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "costs" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission.

Section 4 (b) (16 U. S. C. sec. 797 (b)) authorizes and empowers the Commission—

> (b) To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

Section 8 of Part I (16 U. S. C. sec. 801), formerly Section 8 of the Federal Water Power Act of 1920, 41 Stat. 1068:

> SEC. 8. That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be sub-

ject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: *Provided,* That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

Section 10 (d) and (e) (16 U. S. C., secs. 803 (d) (e)):

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of the Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or un-

til the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require; * * *

Section 14 (16 U. S. C., sec. 807):

SEC. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be deter-

mined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided,* That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

Section 20 of Part I (16 U. S. C. sec. 813), formerly Section 20 of the Federal Water Power Act of 1920 (41 Stat. 1073):

SEC. 20. * * *

* * * * *

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

Section 201 (a) (16 U. S. C. sec. 824):

SECTION. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

Section 301 (a) (16 U. S. C. sec. 825):

SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may clas-

sify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

Section 302 (b) (18 U. S. C., § 825a):

(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation rates, shall notify each State commission having jurisdiction with respect to any public utility involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

Section 304 (b) (18 U. S. C., § 825c):

(b) It shall be unlawful for any person, willfully to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, memorandum, record, or account required to be made, filed, or kept under this chapter or any rule, regulation, or order thereunder.

Section 316 (18 U. S. C., § 825o):

(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or

who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, or any rule or regulation imposed by the Secretary of War under authority of Subchapter I of this chapter shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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List of Cases.

Statutes.

Supreme Court of the United States

October Term, 1942.

No. 616.

LOUISVILLE GAS AND ELECTRIC COMPANY, - *Petitioner,*

v.

FEDERAL POWER COMMISSION, - - *Respondent.*

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Louisville Gas and Electric Company, respectfully prays this Court to reconsider the Order made on February 8, 1943, denying its petition for writ of certiorari. In support whereof petitioner submits:

I.

After the petition for writ of certiorari herein had been filed on January 5, 1943, this Court on January 11, 1943, decided the case of *The Public Utilities Commission of Ohio, et al.*, v. *United Fuel Gas Company, et al.* Petitioner, of course, did not have the benefit of the Court's opinion in the Ohio case when preparing its petition for writ of certiorari.

The decision of the court below is in conflict with the opinion and decision of this Court in the Ohio case.

The Ohio case involved the Natural Gas Act of June 21, 1938, 52 Stat. 821, 15 U. S. C. A., Sec. 717, whereas the instant case involves the 1935 Federal Power Act, 49 Stat. 847, 16 U. S. C. A., Sec. 791(a).

These two Acts are companion pieces of legislation —one covers the natural gas utility industry and the other the electric utility industry. In each of these Acts Congress delegated to the Federal Power Commission limited jurisdiction over gas and electric companies, respectively, and distinctly left to the States jurisdiction over local matters with the idea that Federal regulation should complement and not supersede or conflict with State regulation.

This Court's opinion in the Ohio case states:

> "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess. pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess. pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess.
>
> "Upon the undisputed facts in this record, United is plainly subject to the exclusive jurisdiction of the Federal Power Commission with re-

spect to rates and charges for natural gas transported by it from West Virginia and Kentucky to Ohio. * * *"

The Federal Power Act contains the following, which is stronger than any statement in the Natural Gas Act as to the separate spheres of Federal and State regulation of electric companies:

"* * * such federal regulation however to extend only to those matters which are not subject to regulation by the States."

The decision of the Court below in conflict and in contrast with the Ohio decision of this Court held that the Federal Power Commission had jurisdiction over petitioner's accounts and accounting system, and affirmed an order of that Commission directing a charge of $601,973.57 to surplus, notwithstanding the undisputed fact that the Company's accounts and accounting system and also its rates, services and securities were actually being regulated by the Public Service Commission of Kentucky, and the further fact that the order of the Federal Commission was directly contrary to orders of the State Commission that the said $601,973.57 should remain in the Company's accounts and not be charged to surplus.

Clearly no "harmony" is possible if both the Federal and State regulatory bodies have jurisdiction to give contradictory orders to the same electric company regarding the same matter. The court below suggested a dual set of books, which to us is unthinkable.

II.

The decision of the court below is also in conflict with the dissenting opinion in the Ohio case, which is in part as follows:

> "* * * In addition, I do not consider the order before us ripe for review. It is simply a declaration of status requiring nothing of United other than cooperation in exploration of the rate problem for the purpose of eventually setting United's rates, and is thus as properly outside the realm now as if this were 'an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order.' *Rochester Telephone Corp.* v. *Commission,* 307 U. S. 125, 129. In this respect, the instant case is identical with *East Ohio Gas Co.* v. *Federal Power Commission,* 115 F. (2d) 385, 388. Unless the grounds of alleged equitable jurisdiction take it outside the scope of the Rochester case, this is not the appropriate time for review."

The 1933 and 1937 Orders of the Federal Power Commission which the court below refused to even consider on the ground that appeals had not been promptly taken were and were styled "determinations" of the "actual legitimate original cost" of the licensed project —they had no immediate legal effect, although they might be the basis of a subsequent order having a legal effect. Consequently, they were not appealable until given such legal effect by the 1939 Order directing a charge to surplus. The court below erred in holding that they were appealable when made and such decision

is in conflict with the above from the dissenting opinion in the Ohio case and also in conflict with *Rochester Telephone Corporation* v. *Commission,* 307 U. S. 125, referred to in the above quotation, and as claimed in our petition for writ of certiorari (p. 37).

III.

The case of *New Jersey Power and Light Company* v. *Federal Power Commission,* No. 329, October Term 1942, as to which this Court granted certiorari, also involved a conflict of jurisdiction between the Federal Power Commission and the State regulatory body. That is, in the New Jersey case two of the four "Questions Presented" were as follows:

> "In view of the provision in Section 201 (a) of the Federal Power Act, that Federal regulation shall not extend to matters subject to regulation by the States, has the Commission jurisdiction over Jersey Central, where it appears that all the facilities and all the activities of Jersey Central are subject to regulation by the Board of Public Utility Commissioners of New Jersey?"
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> "In view of Section 201 (a) of the Federal Power Act, and its legislative history, can the Commission exercise jurisdiction over petitioner or Jersey Central with respect to a 'matter' which the court below found is subject to regulation by the State of New Jersey, and which the appropriate regulatory body of the State of New Jersey has approved?"

In the instant case one of the main questions presented can be similarly stated as follows:

In view of the provision in Sec. 201 (a) of the Federal Power Act that "such federal regulation however to extend only to those matters which are not subject to regulation by the States," and the legislative history of the Federal Power Act, does the Federal Commission have jurisdiction over the Company's accounts and accounting system so as to order a charge to surplus of $601,973.57 when the Company's accounts and accounting system not only, but its rates, services and securities are actually being regulated by the Public Service Commission of Kentucky, and when the order of the Federal Commission is directly contrary to the orders of the State Commission.

The questions presented in this case are as important to the electric industry and to State commissions as those involved in the New Jersey case.

Petitioner respectfully asks this Court to reconsider the order made on February 8, 1943, denying its petition for a writ of certiorari and to grant such writ.

Respectfully submitted,

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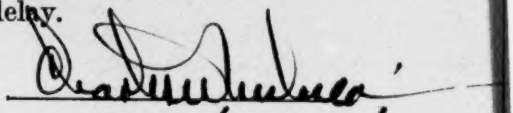
March 1, 1943.

Certificate of Counsel.

Charles W. Milner, attorney for the petitioner in the above-entitled cause, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.



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